consent is not expressly or impliedly given, and cannot be obtained, but it may reasonably be supposed from the circumstances that it would have been given if he could have been asked, the defendant is equally excused; namely, (*a*) Where his property or family is in danger of serious immediate harm and he is absent and there is no time to notify him; or, (*b*) Where his person is in danger of serious immediate harm and he is unconscious of it and there is no time to notify him."

The principal case seems to fall within the last class of cases, and can be justified on the ground of practical necessity rather than on that of contract express or implied. It would not be sound public policy to tie the hands of the surgeon, when in the exercise of his skill he could save the life of the patient. This rule is not a liberal one in its application, and should be applied only to cases in which the patient is in serious immediate danger of loss of life or limb, and where from the circumstances of the case it would be impracticable to obtain his consent.

LIABILITY OF A WAREHOUSEMAN TO AN ASSIGNEE OF A NON-NEGOTIABLE WAREHOUSE RECEIPT.

The decisions of the Courts are not uniform as to the effect of an assignment of a non-negotiable warehouse receipt, where the assignee gives no notice of the assignment to the warehouseman.

In a recent decision, *Stephenville Compress Co. v. First Nat. Bank,* 148 S. W. (Texas), 335, it was decided that, although warehouse receipts recite that the property which they represent will be delivered only upon the return of the receipts, a bank loaning money on the strength of such security is not warranted in relying upon the statement.

The principal case was an action brought by the assignee of a non-negotiable warehouse receipt against a warehouseman for delivering to the pledgor the property represented by the warehouse receipt. The receipt stipulated that the property would be delivered only upon the return of the receipt.

The ground of the decision in this case was that the receipts were non-negotiable, and the assignee had failed to give the ware-

houseman notice of the fact that he held the receipts as collateral or that he had any interest in the receipts.

A warehouse receipt is a contract of bailment between the owner of the goods and the warehouseman, serving as a document of title, and being either negotiable or non-negotiable, according to the obligations assumed by the warehouseman, or according to statutory provisions.

A warehouse receipt, in the absence of statute, is not a negotiable instrument in the commercial sense. If one takes under such circumstances by a transfer of the receipt he is in the same position as if he purchased the property itself. He acquires no better title than the pledgor had. *DeWolf v. Gardner,* 15 Barb. (N. Y.), 508.

The transfer of a warehouse receipt in good faith and in the ordinary course of business operates to transfer to the holder the title to the goods covered by the receipt. *Davis v. Russell,* 52 Cal., 611.

The Courts which follow the doctrine of the principal case hold that when the receipt is non-negotiable, the obligation of the warehouseman is toward the person designated as pledgor and no one else. It is said that although the assignment of the receipt vested title to the goods in the assignee, it did not transfer the contract; that the warehouseman could not be made bailee to the assignee without notice of the assignment of the contract.

"The receipt merely stands in place of the property it represents, and the delivery of it has the same effect in transferring the title to the property as the transfer of the property itself. The delivery of the receipt does not transfer the contract itself, so as to enable the assignee or indorsee to maintain an action upon it in his own name. There is no privity of contract between the warehouseman and the assignee. The assignee occupies no better position as regards the warehouseman than his assignor did." *Jones on Pledges,* Sec. 281.

The transfer of a non-negotiable warehouse receipt does not constitute the warehouseman the bailee for a stranger. He re-

mains the bailee of the party who intrusted him with the goods. The bailor is not bound to produce the receipt as a condition precedent to his right to get back the goods on payment of charges, and the bailee can safely deliver the goods without it. *Hallgarten v. Oldham,* 135 Mass., 1.

When a warehouse receipt runs to the bailor personally, and is not negotiable in form, the bailor may not effect a transfer of the title by mere delivery of the receipt without the consent of the warehouseman. *Gill v. Frank,* 12 Ore., 507. The same Court states: "The custodian cannot become the servant of another in respect of his custody except by his own agreement."

There are many jurisdictions which hold *contra* to the decision of the principal case.

The Court in *Gibson v. Stevens,* 8 Howard (N. Y.), 384, held that the transfer by indorsement and delivery of the receipt transfers the legal title to the property and the constructive possession, and the warehouseman becomes the bailee of the transferee from the time of transfer without notice to or attornment by him.

It has been held by the Federal Court that there is no duty on the assignee of a warehouse receipt to notify the warehouseman of the pledge. *First Nat. Bank v. Bates,* 1 Fed., 702.

The warehousemen by issuing receipts have represented that they had property in the warehouse, and would there keep it until the certificate was returned. The warehousemen and not innocent persons who had relied on their representation must bear the loss. *Quick v. Milligen,* 108 Ind., 419.

The Courts which repudiate the doctrine in the principal case have stated that the receipts are as symbols of the goods, authorizing the possessor of such document to transfer the goods thereby represented. *Durr v. Hervey,* 44 Ark., 301. It is not assumed that the receipts are negotiable in the strict legal sense, but that they may be spoken of in the same sense as a key, in that the delivery of the key of the warehouse is a symbol of the property therein stored. They operate to pass possession and title to the property as effectively as if it were manually delivered.

It is stated in *Benjamin on Sales,* p. 846: "A warehouseman in possession of goods is the bailee of the owner alone from whom he received them, and cannot be forced to become the bailee of anyone else without his consent. But there is nothing in the law to prevent this assent from being given in advance." It has been held that this assent was implied by issuing the warehouse receipt, stipulating that the property would be delivered only on presentation of the receipt. *City Banking Co. v. Peacock,* 103 Ga., 171.

*Colebrook on Collateral Securities,* Secs. 413-414, says: "The transfer for value as collateral security of warehouse receipts by indorsement and delivery or by delivery only where such receipts are made payable to 'holder' or 'only upon the return of this receipt,' vests the legal title and possession of the property in the pledgee and is equivalent to an actual delivery of the property.

"The pledgee of warehouse receipts receiving the same with or without indorsement as collateral upon a *bona fide* loan or discount of commercial paper stands in the same privileged position as a *bona fide* purchaser for value of like receipts." He also states that the pledgor of warehouse receipts is under no obligation to notify the warehouseman of the transfer to him of such receipt as collateral security.

In the case of *Stewart v. Insurance Co.,* 9 Lea (Tenn.), 104, the Court places the ground of its decision on estoppel. "Where a warehouseman issues a receipt stipulating that the goods will be delivered only on return of such, he cannot be heard to say that he had no notice of the transfer of the receipt, but is estopped to deny that he held the property subject to a return of the receipt."

The preponderance of authority is that in the absence of statutory regulations the assignee of a non-negotiable warehouse receipt can recover against the issuing warehouseman for conversion of the stored goods in the absence of notice to the warehouseman of the assignment, which is *contra* to the doctrine of the principal case.

Judge Ramsey, in the case of *Stamford Co. v. Bank,* 144 S. W. (Tex.), 1130, stated: "To require notice would in the nature of

things beget confusion, invite litigation and so discourage and interfere with the orderly conduct of business as to be substantially impracticable."

Many States have now adopted the report of the Commission on Uniform State Laws, which has done much to standardize the warehouse receipts as well as minimize the possibilities of abuse through fraud to which these instruments have been frequently subjected.

Under the Sales Act, Sec. 34, the assignees would not be protected. Under that Act, when there is a transfer of a non-negotiable document of title, the document does not control the possession of the goods, and is therefore not a symbol of them.

CAN A MARRIED WOMAN MAINTAIN AN ACTION OF TORT AGAINST HER HUSBAND FOR A TORT COMMITTED DURING COVERTURE?

In *Thompson v. Thompson,* 218 U. S., 611, the plaintiff sued her husband for $70,000 damages for seven distinct assaults made on her while pregnant. The husband demurred to it, relying on the coverture at the time as a defense. The action was brought under Sec. 1155 of the Code of the District of Columbia, which provided that "married women shall have power to sue separately for the recovery, security or protection of their property and for torts committed against them as fully and freely as if they were unmarried." The majority of the Supreme Court held she could not maintain this action even under this statute. They argued that at common law neither spouse was liable for torts against the other. Admitting that statutes are quite general now, allowing her to protect her person against assaults by third persons, "the statute was not intended to give a right of action as against the husband, but to allow the wife in her own name to maintain actions of tort which at common law must be brought in the joint names of herself and husband." They justify thus limiting the statute by observing that "such radical and far-reaching changes should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention." She has other remedies: (1) a criminal action against her husband; (2) suit for divorce and separation; and (3) chancery will protect her